(2014) 12 BOM CK 0025

In the Bombay High Court

Case No : Chamber Summons (L.) No. 1297 of 2013 in Execution Application (L.) No. 1036 of 2013

Bharat Kantilal Dalal APPELLANT

Vs

Girdharlal Nathubhai Dalal RESPONDENT

Date of Decision : 18-12-2014

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 12, 13, 16, 34, 37
Contract Act, 1872 — Section 23

Citation : (2015) 3 ALLMR 299 : (2015) 5 BomCR 574

Hon'ble Judges : R.S. Dalvi, J

Bench : Single Bench

Advocate : M.P.S. Rao, Sr. Adv., Pranav Sampat, Sachin Mandlik and Parvathi Parkot, i/b. Khaitan and Co, Advocate for the Appellant; Haresh Jagtiyani, Sr. Adv., Yashpal Jain, Vandana Mehta and Nikhil Sansare, Advocate for the Respondent

Judgement

R.S. Dalvi, J.—The applicant, who is the original respondent No.1 in the above execution application along with others, has taken out this Chamber Summons against the claimant / award holder for declaring the award dated 12th July, 2010 a nullity and accordingly for setting it aside and in the alternative for declaring that it stands satisfied.

2. It is trite that an award can be declared a nullity only if it is accentuated by fraud or is patently illegal.

3. The applicant would have the award declared a nullity on various grounds though not specified in the affidavit of support of the application. It has been argued that the award is a nullity upon the following aspects :

i) the award is without jurisdiction;

ii) it is accentuated by fraud;

iii) it is in violation of public policy being in violation of the Foreign Exchange

Regulation Act;

iv) it deals with issues of parties who were not parties to the arbitration including the applicant;

v) the claim in arbitration was barred by the Law of Limitation.

vi) The award is fully satisfied.

4. It may be mentioned that the applicant was not a party to the arbitration and as much as he would not be bound by the award, he cannot challenge the award. It may also be mentioned that a reference to arbitration was made in writing signed by the two parties to the arbitration being the claimant / award creditor (Bharat) and his father, since deceased, one Kantilal Nathubhai Dalal (Kantilal).

5. In order to understand whether the order is a nullity on the grounds which are settled as grounds that would make it a nullity as also on grounds which are stated by the applicant himself certain chronology of the events and dates must be known.

(a) On 20th February, 2009 Bharat and Kantilal (son and the father) referred their various disputes to arbitration of the sole arbitrator who has passed the award. He was their Chartered Accountant. He was known to both and both expressed their confidence and faith in his impartiality.

(b) On 26th February, 2009 the learned arbitrator accepted his appointment.

(c) From 20th April, 2009 Bharat and Kantilal attended the arbitration in which the arbitrator passed directions.

(d) The arbitrator fixed the next meeting on 20th May, 2009.

(e) Kantilal made certain allegations on 27th May, 2009 relating to certain trespass of Bharat and consequent theft of documents.

(f) The arbitrator fixed the next date of hearing on 24th June, 2009. Both Bharat and Kantilal attended that meeting.

(g) Kantilal called upon the arbitrator to discontinue as arbitrator for the first time under his letter dated 20th July, 2009 which made certain allegations.

(h) The learned arbitrator addressed the joint letter to both Bharat and Kantilal on 4th August, 2009 to decide the challenge to the allegations made by Kantilal.

(i) Kantilal called upon the arbitrator to declare his impartiality on affidavit under his letter dated 14th October, 2009. Kantilal further wrote a letter dated 4th January, 2010 to object to the arbitration as prejudicial to him and stated that the proceedings being conducted are "highly irregular" and that the procedural directions were issued without agreement of parties. He saw no purpose in attending before the arbitrator on the next date of which was 11th January, 2010.

(j) Hence it is seen that the procedure was challenged. The arbitrator determined the challenge to the procedure under Section 12 of the Arbitration and Conciliation Act, 1996 (the Act). The arbitrator decided to continue the arbitral proceedings. Kantilal did not attend the arbitration.

(k) An award came to be passed on 12th July, 2010.

The award is not challenged by Kantilal.

Section 13 of the Act may be noted at this juncture, the relevant part of which runs thus :

13. Challenge procedure. (1) Subject to sub section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

(l) On 23rd July, 2010 Kantilal referred to the award and objected to the arbitrator''s jurisdiction. He claimed that the arbitration was irregular and void and the award passed had no force of law. He stated in the letter of that date that he would resist "through all legal remedies and recourses available" to him. Despite the knowledge of the award and despite not accepting the award Kantilal failed to challenge the award and the award came to be final.

(m) Kantilal expired on 8th March, 2013, 2 1/2 years after the award was passed and more than two years after it became final.

(n) The applicant filed the suit to challenge that award being Suit No.470 of 2013. The preliminary issue for determining the maintainability of the suit to challenge arbitration by a party not a party to arbitration has been framed in that suit.

(o) This Chamber Summons has been taken out by the applicant on 18th November, 2013 to set aside the award as a nullity.

6. The award relates to various disputes stated by both the parties who referred their disputes to arbitration. It deals with various accounts and assets of the parties being various immoveable and moveable properties. It deals with certain accounts made by the parties and the entitlement of the parties to various amounts in the bank statements and in various bank accounts. It deals with ownership and possession of real estate being several immoveable properties set out in the award itself. It also considers the interest payable under the award and

the fees of the arbitrator.

7. It is such an award between two parties having various businesses and properties in their joint names or otherwise and for which various disputes were stated to have arisen which are referred to arbitration by parties that this award is challenged as a nullity.

8. It may at once, be mentioned that a reading of the award does not show itself having been accentuated by fraud or to be illegal under any provisions of any statute. The reference to arbitration by Bharat as well as Kantilal is not in dispute. What is sought to be shown by the applicant is that Kantilal appears to have lost confidence in the arbitrator and challenged the procedure adopted by the arbitrator. The arbitrator ruled on the challenge to the procedure. The arbitrator continued with the arbitration. Bharat attended the arbitration; Kantilal failed to attend it. Kantilal had knowledge of the award being passed. Kantilal mentioned about the award in his letter dated 23rd July, 2010 written less than a fortnight after the award was passed. Kantilal stated that he would challenge that award but did not challenge. Kantilal alone could have challenged that award; he allowed the award to become final.

9. The contentions raised on behalf of the applicant who is the brother of Kantilal enumerated above should, therefore, be considered separately and individually.

Award without jurisdiction.

10. The applicant would claim that Kantilal had expressed no confidence in the arbitrator after the arbitration commenced as reflected in the above correspondence. He would also claim that the procedure which the arbitrator followed is to merely decide on the documents of the parties and accepting them irregularly and erroneously. He would claim that arbitrator had no authority given by Kantilal once Kantilal made a grievance about his impartiality and irregularity of the procedure and hence all the acts are without jurisdiction.

11. In the judgment in the case of Jain Studios Ltd. Vs. M/s. Maitry Exports Pvt. Ltd. dated 25th October, 2007 the matter was referred to arbitration. The arbitrator decided that only a part of the claim was barred by limitation and that certain amendments were only clarification and did not fall outside the scope of reference and hence held that he had jurisdiction to proceed in the arbitration which was challenged. The Court considered the difference in the provisions of Section 16, 34 & 37 of the Act and held that such an arbitration could proceed to final award which alone could be challenged under Section 34 of the Act as what was held by the arbitrator was only with regard to his jurisdiction to proceed though titled "interim award"

I do not see how this judgment could serve any purpose in the above lis upon the contention that a plea of limitation (not even raised by the party to an arbitration) could be considered by an executing Court as a plea of lack of jurisdiction which would nullify the award.

Such contentions can be taken up by the none other than the party against whom the award is passed for he alone can challenge the award on these grounds.

Such case does not show want of inherent jurisdiction of arbitrator to whom reference of all disputes between parties is made in writing and signed by the parties to the arbitration.

The award, therefore, cannot be stated to be without jurisdiction.

Award accentuated by fraud

12. It is for the party making the tall claim of fraud to specify the particulars of the fraud and to substantiate the allegations of fraud. The fraud that is claimed in this matter is upon reliance being placed on an account of the four family members of which the parties to the arbitration were two of the family members. They also happened to be partners in a partnership firm. The account relied upon by Bharat in the arbitration and considered by the arbitrator is the same as the account produced by the applicant. The arbitrator referred to it as the account which came to be settled on 26th March, 2001; the applicant has produced the account statement precisely for 26th March, 2001. The total funds mentioned by the arbitrator in paragraph 2.1 (b) of the award is precisely the figure shown in this account statement. The account statement is stated to be in the handwriting of Kantilal who was a party to the arbitration and who alone would be able to speak about the figures that he wrote showing the various settlements between the four family members. The applicant would claim that the four family members who were four partners had various specified shares. 32% of the applicant, 24% of Kantilal, 22% of Bharat and 22% of one Surender who is the brother of Bharat, the important of which is 22% share of Bharat. The arbitrator has specifically considered in paragraph 2.1 (c) that the %age of the Bharat assumed at 22% which was not appropriate and not correctly calculated, an aspect which the applicant cannot challenge and this Court cannot decide.

13. The account statement of Kantilal showing various amounts debited and credited to the parties shows thereunder the share of Bharat of Rs.1.01 Crores. The applicant would claim that a part of this has been taken out of the account of the applicant and put into account of Bharat so that the applicant is adversely affected whilst he was not a party to the arbitration. The same amount has been reflected under the accounts of the applicant Surender as also Bharat. The transfer of specific account from Surender to Bharat is shown. The applicant''s account does not show the aforesaid amount to his credit. The figures under the applicant''s name are different. The figure which is transferred to Bharat is shown under the name of Surender even in the applicant''s column. The appropriation of these amounts was a matter in arbitration and could have been explained and dealt with only by Kantilal who wrote the account but who chose not to appear in arbitration to explain the account and who chose, thereafter not to challenge the award passed upon the account.

14. The principle in the case of Urban Improvement Trust, Jodhpur Vs. Gokul Narain and another, that the validity of a decree found to be a nullity and non est can be set up even at the stage of execution or in a collateral proceeding cannot be disputed. How the decree is shown to be a nullity has to be seen.

15. In the case of S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, the plaintiff had executed a registered dead of release and relinquished all the rights in the suit property and yet sued and obtained a preliminary decree of partition, which was held to be a fraud which would vitiate the entire proceeding, the plaintiff having had no right to sue itself.

In the above lis both the parties jointly referred their disputes to arbitration. The fraud contemplated by the applicant representing the award debtor is of no such preview. The grant by the arbitrator is challenged as fraudulent and not the reference by the award holder. It is inconceivable how this judgment would apply at all to the above lis.

16. Following from the case of Naidu, it was held in Union of India (UOI) and Others Vs. Ramesh Gandhi, also that as fraud vitiates everything, including a judgment which becomes is a nullity and non est and not in consonance with law if obtained by practicing fraud and hence even an FIR based upon a fraud by suppression of material facts could be looked into to see its bonafides, would go the same way.

Subject only to the fact that the applicant''s properties cannot be used in satisfaction of the award and that the award cannot be enforced against the applicant personally and individually (which is not sought to be done), the settlement of account by mentioning some figures in the account statement of the third parties cannot be challenged as a fraud.

Violation of public policy

17. Mr. Jagtiyani on behalf of the applicant would claim that the award is passed in violation of the provisions of the Foreign Exchange Regulations Act, 1973 (FERA) without stating which provision has been violated by the arbitrator. He would claim that one foreign account (NRI) is shown to be in the joint names of four persons, three of whom are resident Indians. The applicant has not shown which is the account and how he claims the status of the parties being resident or non resident. The award makes no mention of any bank account which stands in four joint names which is the subject matter of the arbitration. The account is further stated to be opened without the permission of the RBI and is stated to have received funds generated in India and accumulated in foreign country which is stated to be an offence under FERA. Mr. Jagtiyani would claim that the arbitration upon such account is void under Section 23 of the Indian Contract Act being in violation of FERA and, therefore, the award is non est and cannot be enforced.

18. In the case of State of Punjab (Now Haryana) and Others Vs. Amar Singh

and Another, , a sale by compromise of an office attached to a temple in satisfaction of a debt due to a party against the seller was held to be a compromise against public policy and hence unlawful. Hence a decree based upon it could not be enforced. It was observed that the Collector was enjoined to "lift the veil and look at such an agreement of the parties in the face.". In this case the illegal act of Indian person opening an NRI Account is stated, but no such account is even shown to Court.

19. The judgment in the case of V Narasimyharaju Vs. V Gurumurthy Raju, (1963) before Supreme Court), held that where a party alleged fabrication of accounts and cheating him by insertion of the name of another person in the books of accounts of the partnership firm to show that both the persons had the share shown against their names and he agreed to withdraw the criminal complaint and refer the dispute to arbitration, the reference itself and hence the consequent award were held to be invalid and void as hit by Section 23 of the Indian Contract Act, 1872 as being opposed to public policy as the consideration under the reference was unlawful. This was held on the admitted fact of the criminal complaint having been filed for uncompoundable offences which were agreed to be compounded and referred to arbitration.

In this case the offence under FERA is alleged only by the applicant only in this proceeding. It is neither admitted, nor proved nor even shown that the foreign account was opened by an Indian as alleged.

Such a tall claim would require particulars of the account to be given and the particulars of the provisions of FERA which are required to be mentioned neither of which is done so that the challenge on that ground must fail.

Liability of applicants who were not parties to the arbitration

20. The applicant would claim upon the aforesaid account that the amount shown to be credited to Bharat has been taken from his account and added to the account of Bharat. He claims that he was not a party to the arbitration so that he could not have shown how the same figure is mentioned in his account as also in the account of Bharat.

21. Mr. Jagtiyani argued that the award imputes liability upon various persons (such as the applicant and Surender, the brother of Bharat) in various respects. It is seen that the award is passed only against Kantilal and makes him liable for what has been the acts of the family members who may also be partners in a partnership firm of the family as against Bharat, and Bharat has sought to execute the award only against the estate of Kantilal and not against any other party personally or individually. Of course, that Bharat cannot do and has not done.

22. The basis of the account admittedly written by the Kantilal cannot be understood in the absence of the case of Kantilal either before the arbitrator in arbitration or before the Court in the challenge to the award.

Hence except for the fact that the properties of the applicant cannot be taken in execution of this award and the applicant is not individually bound by the award, the award has attained finality as against the estate of Kantilal.

Limitation

23. The applicant would contend that arbitration was barred by limitation in as much as the aforesaid account is dated 26th March, 2001 and the arbitration itself commenced from February, 2009.

The arbitration commenced with the reference made not only by the Bharat claimant / award creditor but also by Kantilal who chose not to challenge the arbitration itself on the ground that it was barred by limitation so that the award came to be final. The disputes that were referred to arbitration were not only in respect of the aforesaid account. There were various disputes relating to various properties. Each of these were dealt with by the arbitrator in the final award. Those disputes continued until and pending the arbitration.

24. The award refers to a certain letter / agreement 2nd November, 2009 which is not produced before this Court. Mr. Jagtiyani would refer to observations made by the arbitrator in paragraph 6.1.1 relating to the letter without producing the same. It would not be possible to conclude the claim of limitation upon a sole observation of the arbitrator in that regard.

There is nothing to suggest on the face of the award that it would be barred by the Law of Limitation upon the cause of action between the parties accruing on a single given date. Consequently it is only the party against whom the award is filed who would be in a position to show, if at all, that the dispute was barred by limitation.

Award fully satisfied.

25. The applicant would contend that Bharat has received much more than his entitlement and consequently the award has been satisfied. It is the case of the applicant that the 4 persons mentioned in the aforesaid statement are not only four family members but the four partners of the firm of Kantilal and Company being the applicant, Kantilal, Bharat and Surender and having 32%, 24%, 22% and 22% share respectively. The account shows nothing of the kind. The applicant would claim that Bharat was entitled to 22% of whatever was mentioned under his name in the aforesaid account, Bharat claimed 70% erroneously and the arbitrator granted 100% to Bharat. The applicant would also claim that Bharat is in possession of some of the immoveable properties (without producing the title deeds of these properties) and hence Bharat has been given a lot more than he is entitled in the award and has already got with himself more properties than what would come to his 22% share.

The account does not speak of the aforesaid %age. The account clearly shows amount payable under the various columns of the aforesaid 4 persons. Whatever be the agreement between the parties, Kantilal in whose handwriting the account was made up showed the transfer between two sons. The amount mentioned under the column of Bharat would, therefore, have to be paid entirely to Bharat by Kantilal and the award in that behalf can neither be challenged by the applicant nor reconsidered by the Court.

26. The disputes with regard to immoveable properties are quite apart. They have been dealt with separately. The award would show possession of properties as also transfer of certain shares of companies. The right, title and interest of Kantilal in certain immoveable properties by transfer deeds etc. are directed.

Mere possession of Bharat in some of those properties without the corresponding transfer documents would not show how the award would stand satisfied.

27. The award has already come to be final. It is for the Bharat to execute the award. Upon the application of the applicant neither can the award be set aside under the provisions of the Arbitration and Conciliation Act, 1996, nor can it be declared a nullity or non est as claimed by the applicant. The title of any other party including applicant would be seen upon the attachment levied in execution. This Chamber Summons taken out by the applicant is pre-mature. The directions claimed against the arbitrator are impertinent. The direction to the claimant who is the award creditor to give details of assets to the executor of the estate of the award debtor is rather a legal. The stay of execution proceedings is not warranted. The entire application is completely misconceived and is dismissed with costs of Rs.1 lac.

28. The Execution shall proceed in accordance with law.

29. The Chamber Summons is disposed of accordingly.

30. This order is stayed for 3 weeks.